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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWARD REYNIR SULLIVAN, Petitioner, v. MATTHEW MARTELL, Warden, Respondent.	08CV0406 BEN (AJB) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER** Judge: Hon. Anthony J. Battaglia

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After Sullivan waived his rights to a jury, a judge found him guilty of several crimes and sentenced him to a middle term, as enhanced by, among other things, a prior conviction. Sullivan then waited more than a year to raise any challenge to his judgment. His Petition is thus untimely, and his challenges to his sentence lack merit.

Procedural History

In October 1995, Sullivan ransacked and burglarized a woman's home. He took nearly fifty items of jewelry, but left behind his fingerprints. (Lodgment 4 at 1-2).

In December 1995, the San Diego County District Attorney charged Sullivan with residential burglary (Cal. Penal Code §§ 459, 460, 461) and receiving stolen property (Cal. Penal Code § 496(a)). The prosecutor further charged that Sullivan had committed both crimes while on bail after an earlier conviction (Cal. Penal Code § 12022.1), and that he had a prior serious robbery conviction that was also a strike (Cal. Penal Code § 667). (Lodgment 1 ("CT") at 3-4; *see* CT at 9-16 (regarding Sullivan's 1995 guilty plea to a robbery).)

Sullivan waived his right to a jury trial (CT at 55; Lodgment 2, vol. 2, at 7-8), and in September 1996 the San Diego County Superior Court found him guilty as charged and found the enhancements to be true (CT at 57-58). Sullivan received a fifteen year sentence that included eight years (or double the middle term) for burglary, two one-year enhancements for committing new crimes while on bail, and five years for the prior robbery conviction. (CT 59.)

On July 31, 1997, the California Court of Appeal affirmed the judgment after Sullivan's counsel filed a no-merit brief on appeal. (Lodgments 3, 4.) When Sullivan did not file a petition for review within the next forty days, or by September 9, 1997, his case became final for federal limitations purposes. *See* 28 U.S.C. § 2244(d). The limitations period expired one year later, or on September 9, 1998.

In December 1998, Sullivan sought habeas corpus relief from the San Diego County Superior Court on a claim regarding his sentencing that was denied, among other reasons, for being untimely. (Lodgment 6 at 2 (citing *In re Clark*, 5 Cal. 4th 750, 765, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993)).)

More than seven years later, Sullivan again sought habeas relief from the San Diego County Superior Court on another sentencing issue, and again the court denied relief, among other reasons, for his failure to explain why Sullivan was "just getting around to raising" an issue nearly ten years after his conviction. (Lodgment 8 at 3 (citing *In re Clark*, 5 Cal. 4th at 765).)

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Nearly a year after that, Sullivan once again sought habeas relief from the San Diego County Superior Court raising issues under the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), but the court denied relief. (Lodgment 10 at 2-3 (citing, *e.g.*, *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)).) The California Court of Appeal and California Supreme Court also denied, in turn, substantially similar habeas petitions. (Lodgments 12, 14.)

In 2008, Sullivan filed for federal habeas relief in the Central District of California, and his case was transferred to this Court.

Argument

I.

SULLIVAN WAITED TOO LONG BEFORE SEEKING FEDERAL RELIEF, WHICH MEANS HIS PETITION IS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS

Sullivan's state-court conviction became final for federal purposes in September 1997, but he did not begin to seek any collateral relief in any court until more than a year later. Because Sullivan should have known about his claims no later than the date of finality, he is not entitled to a later start of the limitations period or to equitable tolling. His Petition must be dismissed.

A. Sullivan's State-Court Decision Became Final In September 1997

The federal limitations statute under 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Sullivan did not file a petition for review after the California Court of Appeal issued its opinion on direct appeal on July 31, 1997, and so his conviction became final for federal purposes forty days later on September 9, 1997, when the time for him to file a petition for review expired under California law. *Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002) (relying on Cal. Ct. R. to establish date of finality); Cal. Ct. R. 8.264(b)(1), 8.366, 8.500(e)(1); former Cal. Ct. R. 24, 28.

Sullivan knew, or reasonably should have known, about the factual predicate of each of his claims, including his sentencing arguments, no later than the date of

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finality, when he knew or should have known about his sentence. *See Hasan v. Galaza*, 254 F.3d 1150, 1154-55 n.3 (9th Cir. 2001) (noting that the standard for determining a claim's factual predicate is objective). Sullivan may be arguing that he should be entitled to a later start to the limitations period under 28 U.S.C. § 2244(d)(1)(C) due to the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), but this case does not apply retroactively to cases like Sullivan's that were final before it was decided. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002); *also Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1246 (9th Cir. 2005). Neither *Apprendi* nor *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), have yet been "made retroactively applicable" under 28 U.S.C. § 2244(d)(1)(C). *See Tyler v. Cain*, 533 U.S. 656, 662-65, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) (regarding similar language in 28 U.S.C. § 2244(b)(2)(A)). Nothing prevented Sullivan, finally, from himself raising a legal challenge to his sentence even with the benefit of helpful Supreme Court authority; the defendant in *Apprendi*, for example, received relief on his claim without the benefit of the *Apprendi* decision.

Sullivan thus may not receive a later start to his limitations period under 28 U.S.C. § 2244(d)(1)(D). Absent either a delayed start to the limitations period under § 2254(d)(1) or statutory tolling under § 2254(d)(2), Sullivan had until September 9, 1998, to file his federal petition. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Sullivan did not file his Petition until 2008, and so it is late.

B. Sullivan Is Not Entitled To Sufficient Statutory Tolling Under § 2244(d)(2)

Sullivan sought some collateral relief in the California courts, but not until after his limitations period had already expired. (*See* Lodgment 5.) Because he waited more than a year after his appeal became final before he sought any state-court relief, the federal limitations period expired, and he is not entitled to any statutory

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tolling for any of his later state habeas corpus petitions. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Green v. White*, 223 F.3d 1001 (9th Cir. 2000). Sullivan, moreover, may not receive any statutory tolling for his first two habeas petitions in the San Diego County Superior Court because they were expressly rejected as untimely. *Allen v. Siebert*, 522 U.S. ___, 128 S. Ct. 2, 3-4, 169 L. Ed. 2d 329 (2007) (holding that a state petition rejected as untimely is not "properly filed" and not pending for purposes of 28 U.S.C. § 2244(d)); *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 1812-13, 161 L. Ed. 2d 669 (2005).

Sullivan is not entitled to sufficient, if any, statutory tolling.

C. Sullivan Is Not Entitled To Any Equitable Tolling

The Supreme Court has not ruled whether equitable tolling should apply to habeas corpus petitions. *See Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1085, 166 L. Ed. 2d 924 (2007); *Pace v. DiGuglielmo*, 544 U.S. at 418 n.8. But under other Supreme Court precedent, it should not. *See Bowles v. Russell*, __U.S.__, 127 S. Ct. 2360, 2364-66, 168 L. Ed. 2d 96 (2007) (distinguishing statute-based time limits from rule-based time limits); *United States v. Beggerly*, 524 U.S. 38, 48, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (holding that equitable tolling was unavailable under the Quiet Title Act because it would be inconsistent with Congressional intent).

Even under extant circuit precedent, Sullivan has done nothing to carry his burden of establishing that he is entitled to equitable tolling. *See Smith v. Duncan*, 297 F.3d at 814; *Miranda v. Castro*, 292 F.3d 1063, 1065-66 (9th Cir. 2002). Sullivan bears the burden of establishing equitable tolling, and in order to do so he must demonstrate: (1) extraordinary circumstances beyond his control that (2) made it impossible to file a petition on time. *Id.* at 1066-67 (attorney miscalculation of AEDPA limitations period did not merit equitable tolling). Equitable tolling is "unavailable in most cases." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *see Pace v. DiGuglielmo*, 544 U.S. at 418 (requiring diligence).

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Sullivan does not appear to make any argument regarding equitable tolling of the statute of limitations. *Cf.* 28 U.S.C. § 2244(d)(1)(C) (regarding statutory tolling for a newly made retroactive decision). His Petition is late, and it must be dismissed with prejudice.

II.

SINCE SULLIVAN AGREED TO WAIVE HIS RIGHT TO A JURY, HIS ARGUMENTS HAVE NO MERIT

Sullivan raises a series of arguments that allege his sentence is unlawful and that his waiver of rights was unknowing. (Pet. (Doc. 1) at 12-13 of 80.) Aside from the facts that (1) Sullivan received the middle term on his burglary conviction, (2) he received the statutory term for each of the three enhancements, and (3) the *Apprendi* decision does not apply retroactively to cases like Sullivan's that were final before it was decided, the record demonstrates that Sullivan knowingly and intelligently waived his rights to a jury determination of his case. (CT at 55; Lodgment 2, vol. 2, at 7-8.)

Sullivan thus waived his rights to a jury. *See United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). The state courts, moreover, reasonably and properly denied Sullivan's arguments by finding that his middle-term sentence was appropriate and that he could not take advantage of any change in law worked by *Apprendi* or later decisions. 28 U.S.C. § 2254(d); *see Lambert v. Blodgett*, 393 F.3d 943, 964-66 (9th Cir. 2004) ("[D]eference to state court determinations must follow an adjudication on the merits."); (*also* Lodgments 10, 12 (citing *Schardt v. Payne*, 414 F.3d 1025, 1036 (9th Cir. 2005) (holding that the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), does not apply retroactively, either)).)

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CONCLUSION

Sullivan's Petition should be dismissed with prejudice as barred by the statute of limitations, and it has no merit.

Dated: July 9, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Sullivan v. Martell**

No.: **08CV0406 BEN (AJB)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 9, 2008, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

EDWARD REYNIR SULLIVAN
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LONG BEACH, CA 90804

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 9, 2008, at San Diego, California.

A. Curiel	[signature]
Declarant	Signature

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